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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

Conflict of Decisions in the Circuit Courts of Appeals.

Among the reasons set out by the Rules of this Court which will be considered in connection with the granting of a writ of certiorari is where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter, or has decided an important question of Federal law which has not been, but should be, settled by this Court (Rule 38).

That there is such a conflict between the circuit courts of appeals is shown by the petition for certiorari in No. 329, *Routzahn* v. *Willard Storage Battery Co.* The same general questions relating to Federal tax laws are involved in that case. The petition in that case states (p. 8):

> "There is thus a conflict between circuit courts of appeals as to the meaning to be given to the term 'primarily adapted.' This is an important question

> of law which should be settled. Aside from the large amount of taxes involved in this particular case, there are many other pending cases involving large sums which present the same general question. The question is therefore one of large public interest and of great importance in the administration of the revenue laws."

Nevertheless, counsel for respondent, admitting that there is a question of general law of large public interest and of great importance in the administration of the revenue laws, opposes certiorari in the instant case, while asking this Court to grant the petition for certiorari in No. 329.

The instant case was tried in the District Court of Connecticut (58 Fed. (2d) 246) and the decision was against the Government. It was reversed in the Second Circuit Court of Appeals (63 Fed. (2d) 783) and the decision of that circuit is the only case involving these questions decided in favor of the Government by any circuit court of appeals.

In No. 329, five cases were commenced in the District Court for the Northern District of Ohio, and decided against the Government. They were consolidated on appeal to the Sixth Circuit and decided against the Government (65 Fed. (2d) 89).

Other cases involving the same general questions here presented are: *Electric Storage Battery Company* v. *McCaughn*, 52 Fed. (2d) 205, decided against the Government in the Eastern District of Pennsylvania and affirmed by the Third Circuit Court of Appeals (63 Fed. (2d) 715). In that case, however, no petition for certiorari was presented to this Court and the judgment of the circuit court of appeals has *become final*.

Jefferson Electric Manufacturing Company v. *United States* was decided by the Court of Claims in favor of the claimant (69 C. Cls. 150; 38 Fed. (2d) 139). Petition for certiorari on behalf of the Government is pending in this Court (No. 171).

In a footnote on page 9 of the Petition in No. 329 counsel quotes the Treasury Department to the effect that there

are ninety eight cases pending in the courts involving over $5,000,000.00 in taxes and additional interest of more than $2,000,000.00 and yet counsel for respondent seeks petition for certiorari only in cases that have been decided against the Government and opposes certiorari in the one case that has been decided in favor of the Government. Both questions set out on page 2 in petition in No. 329 are involved in this case. The district court decided both in favor of the petitioner. The court of appeals decided the "chief use" question against petitioner and did not pass on Section 424 of the Revenue Act of 1928.

The Findings of Fact.

Petitioner does not concede that the findings of the district court were special findings, but admitting only for the purposes of argument that they were special findings, the Circuit Court of Appeals was nevertheless limited in reviewing the case "to the determination of the sufficiency of the facts found to support the judgment" (Petition 37).

The respondent in his opposing brief takes issue with the petitioner on the point as to whether the findings of the district court were general or special. Petitioner contends that they were general, because they were parts of the opinion, and that the court had no power by its order to make findings that were general into special findings. This point has been argued in petitioner's supporting brief and need not be repeated here.

Respondent claims that the findings of the district court were special and for that reason the court of appeals had authority to examine the evidence and determine whether that evidence supported the judgment entered by the district court in favor of the petitioner. Respondent takes this position after the admission found on page 6 of his brief which is as follows:

> "In the instant case the trial judge sitting without a jury in accordance with a written stipulation found all

> of the facts in respect of the chains involved *necessary to the legal conclusion which he reached.*"

After this admission, respondent, on page 7, says:

> "The findings thus set forth were consequently special findings within the meaning of the statute and the Circuit Court of Appeals under Section 700 *could determine the sufficiency of the evidence to support the judgment.*"

Respondent also states on page 12:

> "There is no substantial doubt that the court had power *to review the evidence.*"

The above quotations (italics ours) show that respondent insists that under Section 700, where the findings are special, the appellate court may consider the evidence introduced on the trial. This is not the import of Section 700 (Petition 37). The part of said section referring to special findings is as follows:

> "And when the finding is special the review may extend to the determination of the sufficiency of the facts *found* to support the judgment."

An appellate court cannot go behind such findings of the trial court. There is no authority anywhere, even though the findings are *special*, for an appellate court to consider the sufficiency of the evidence. Its duty is confined to a determination of the sufficiency of the facts *found* to support the judgment. As the respondent has admitted in its brief, as above stated (page 6), that the trial court found "all of the facts in respect of the chains involved necessary to the legal conclusion which he reached," the court of appeals had no authority to go behind the findings of the trial court.

In *Anglo-American, etc., Co.* v. *Lombard* (132 F. 721, 733), Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete." (Citing cases.)

(Certiorari denied, 196 U. S. 638, 49 L. Ed. 630.)

In *Electric Reduction Co.* v. *Lewellyn, Collector of Internal Revenue* (8 Fed. (2d) 91), the District Court for the Western District of Pennsylvania made special findings of fact and gave judgment for the defendant. The Circuit Court of Appeals (11 Fed. (2d) 493) reversed the district court, but this Court in 275 U. S. 243, 72 L. Ed. 262, sustained the district court and reversed the court of appeals, using the following language:

> "A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the *facts specially found* to suppo the judgment, and to the rulings excepted to and presented by the bill of exceptions." (Italics ours.)

In *Ingram-Day Lbr. Co.* v. *McLouth*, 275 U. S. 471; 72 L. Ed. 378, this Court said:

> "Since a jury was waived in writing, appellate review is limited to the sufficiency of the *facts specially found* to support the judgment and to rulings excepted to and presented by a bill of exceptions." (Italics ours.)

In *U. S.* v. *U. S. F. & G. Co.*, 236 U. S. 527, 59 L. Ed. 703, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court.

> The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

In this jury-waived case the district court could make either general or special findings. Petitioner contends that its findings were general, because they were part of the opinion and this Court has said in *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629 (Pet. 16), and *Harvey Company* v. *Malley,* 288 U. S. 415, 77 L. Ed. 621 (Pet. 20), that such findings are not special. If the findings are special as respondent contends, then the court of appeals could determine whether they support the judgment. The court of appeals could not either under general or special findings arrogate to itself the functions of a jury and pass upon the evidence.

Respondent's brief (P. 10) states that the decision below may be adequately rested on the ground that petitioner's chains were designed and primarily adapted for automobile use and that the conclusion to that effect is amply supported by the evidence. Even if the appellate court could make its own findings, the evidence fairly construed does not sustain the finding that the tire chains were designed and primarily adapted for use on automobiles, etc. The Parsons patent, being dated March 24, 1903, was prior to the Weed patent and was therefore the basic patent. It recited that the chain was applicable to the "wheels of vehicles, such as cycles and motor cars, but also to * * * pulleys, * * * friction rollers," and the like. (R. 40, 131).

Congress by enacting Revenue Act of 1932, Section 606 (c) (U. S. C. A., Title 26, Section 3601), in language different from the acts here involved, intended to change the law and gave a legislative construction of these acts that they do not include tire chains.

Petitioner contends that tire chains were not intended to be taxed by the acts of Congress here involved, because of

the change in the language used in the enactment of the Revenue Act of 1932 wherein tire chains were specifically named (Petition 11, Reason 6).

In *Brewster* v. *Gage*, 280 U. S. 327, 74 L. Ed. 457, this Court had under consideration the Revenue Act of 1918 and the meaning of the word "acquired" in connection with the taxation of certain stocks received on distribution of an estate. The 1918 Act used the word "acquired," while the 1921 Act provided "time of such acquisition." Regulations promulgated under the two acts were substantially the same. This Court held:

> "The substantial re-enactment in later acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation" (citing cases), but the court then said:
>
> "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

The Revenue Acts of 1921 and 1924, under which tire chains were taxed, subjected to a tax "tires, inner tubes, *parts or accessories for* automobile trucks, automobile wagons, other automobiles and motorcycles (except tractors) sold to any person other than a manufacturer or producer of said last named articles." The 1924 Act was repealed in 1926. In enacting the Revenue Act of 1932, Congress intended to tax tire chains and used different language, as follows:

> "There is hereby imposed * * * a tax * * *:
>
> (*c*) Parts or accessories * * * For the purposes of this subsection and subsections (*a*) and (*b*), spark plugs, storage batteries, leaf springs, coils, timers, and *tire chains*, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (*a*) or (*b*) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use." (Italics ours.)

The Senate Committee in its Report No. 665, 72d Congress (H. R. 10236, p. 44), states:

> "The House bill contained a provision, which is retained by your Committee, to eliminate the effect of certain court decisions under which many parts and accessories have escaped tax under prior revenue acts on the ground that they were not 'primarily adapted' for use on automobiles or trucks, since they might be used on boats, tractors, etc. Under the bill, spark plugs, storage batteries, leaf springs, coils, timers, and *tire chains*, if suitable for use on automobiles and trucks, will be taxable as parts or accessories whether or not 'primarily adapted' for such use." (Italics ours.)

This shows a clear intention to change the laws here involved and is evidence that the Congress did not under the old laws intend that chains not "primarily adapted" for use on automobiles should be subject to the tax.

Applying the language of this Court to the instant case, Congress, in the 1932 Revenue Act, deliberately selected language differing from that used in the earlier acts, indicating that a change of law was intended, and tire chains, not taxable under prior acts of Congress, are intended to be taxed under the 1932 Act.

Petitioner contends that this Court should grant its petition for certiorari.

Respectfully submitted.

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